IN THE

STATE OF MICHIGAN

On application for certiorari to the Supreme Court of the State of Michigan.

Respondent's Rejoinder to Petitioner's Reply Brief

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Subject Index of Matter in Brief

The Argument:

Table of Cases cited

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1947

No. 623

CARL F. DELANO, Petitioner

v.

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IV

The Argument [*]

Point One

The question whether petitioner was denied due process because the same judge who issued the warrant also presided as examining magistrate and heard preliminary motions, was not properly raised below.

We deem it necessary to answer certain statements set forth in petitioner's reply brief:

[*] In this rejoinder we follow the framework of our brief opposing the petition for certiorari.

1. We are chagrined to note our mistake in stating that a transcript of the preliminary examination was not included in the record, and we hasten to acknowledge the error and to apologize therefor. The point we desired to emphasize, however, was that petitioner did not protest that the judge who conducted the investigation and issued the warrant, also acted as examining magistrate and passed upon certain motions.

2. On page 8 of his reply brief, counsel takes the position that under Michigan law he did not have to object to 'the grand juror, examining magistrate and circuit judge, Hon. Leland W. Carr, presiding at the examination or passing upon his motion to quash and motion for separate trial', urging that the fact that the judge did so act, although disqualified, divested him of jurisdiction. And, he adds: 'No affidavit of prejudice is necessary in the State of Michigan and the question may be raised for the first time on appeal',

Counsel, however, has overlooked (quite inadvertently) decisions of the Michigan Supreme Court:

People v. Ferrise, 219 Mich. 471;

People v. Butler, 221 Mich. 626;

Crowley, Milner & Co. v. —Judge, 239 Mich. 605;

Kolowich v. Ferguson, Judge, 264 Mich. 668.

In the leading case of *People v. Ferrise, supra,* the court held (syl. 2) 'that a judge of the recorder's court of Detroit acted as a police magistrate at the preliminary examination . . and held defendant for trial, would not disqualify him from acting as trial judge in said case in the absence of a claim of personal bias or prejudice on the part of the judge'.

That decision was followed in *People v. Butler, supra,* where the defendant-appellant contended that a judge of the trial court was disqualified to conduct the trial because he was examining magistrate on the examination and because the case was assigned to him by the presiding judge on the advice of the prosecuting attorney. The Supreme Court said:

> "In the administration of the criminal law it is never proper to permit the prosecuting attorney to have any part in the selection of a judge to try his accusations. However, as there is no claim of bias or prejudice on the part of Judge Marsh, he cannot be held to be disqualified".

In the case of *Crowley, Milner & Co. v. Judge, supra,* the court laid down the following rule:

> "The rule disqualifying a judge, whether statutory or common law, is predicated upon public policy, and, if prejudice or bias is the reason alleged, there must be prejudice or bias in fact. Such prejudice or bias can never be based solely upon a decision in the due course of judicial proceedings" (239 Mich. at p. 613).

And, after citing sister-state authority, the court continued:

> "Else such be the rule any dissatisfied party, upon a hearing for a temporary injunction, temporary receiver, or other interlocutory matter, can assert prejudice or bias and recuse the judge".

And in *Kolowich v. Ferguson, Judge, supra,* the court adhered to the same rule.

3. In his reply, p. 4, counsel states this question was raised on page 24 of the brief filed for petitioner in the court below.

On that page of counsel's brief, and as a part of his 'Statement of Facts', it is said that the respondent further claims that the conviction should be set aside for certain assigned reasons, the first of which reads as follows:

> "1. Because the arrest, arraignment, trial, conviction and sentence of the respondent Carl F. DeLano, violates the provisions of the fifth and fourteenth amendments to the Constitution of the United States, in that the said respondent . . has been deprived of liberty and property without due process of law, and that he has been denied the equal protection of the laws as guaranteed by the said Fourteenth Amendment to the Constitution of the United States".

But it was not stated as a question involved; it gave no hint of the nature of such deprivation; it did not mention the fact that the circuit judge had issued the warrant and presided at the preliminary examination; it was not presented as a question in argument; and the court below was not asked to decide the precise question.

It should go without saying that under the law of Michigan an assignment of error is supposed to be abandoned if not argued or otherwise insisted upon in the Supreme Court.

Reed v. Civil Service Comm., 301 Mich. 137;

Tribbett v. Village of Marcellus, 294 Mich. 607;

Herbert v. Durgis, 276 Mich. 158.

Point Two

The question of the qualification of Mr. Justice Dethmers to sit, was not raised in the court below.

1. It is said that we have gone outside the record in stating the facts relating to the duties of the Attorney General, and to the non-participation of Mr. Dethmers in the prosecution of this case while Attorney General.

The answer is that there is nothing whatever in the record as it stands to indicate any prejudice or bias on the part of this Justice; and the very fact that petitioner failed to raise the question in the court below made it necessary to depart from the record in order to explain the situation (and it is interesting to note that counsel disputes very few of the facts so stated in our brief).

2. Laying aside everything else said in counsel's reply brief, it comes down to this:

During the trial of the cause in the circuit court, Mr. John R. Dethmers was Attorney General of the State of Michigan. But the record does not disclose that he took any part in the proceedings, or that he exercised his power of intervention. Nor is there any showing, of any kind whatsoever, on the face of the record that he became biased or prejudiced in fact. *Crowley, Milner & Co. v. Judge,* 239 Mich. 605; *Kolowich v. Ferguson, Judge,* 264 Mich. 668.

The record fails to show that petitioner's counsel challenged the right of Mr. Justice Dethmers to sit in the case or participate in the decision. Nor did he raise the question on motion for rehearing.

Counsel says there is no proof in the record that it was not until January 1947 that the Solicitor General assumed charge of the case on appeal. Had counsel raised the question now urged so vehemently, the State would have had opportunity to make such proof. That is one of the factors that make for unfairness when a question of this nature is presented for the first time on application for a writ of certiorari from this Court.

Conclusion

With respect to all other points raised in petitioner's reply we choose to stand on our first brief. And we respectfully submit that the writ of certiorari should be denied.

Respectfully Submitted,

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